

**Letter of Findings Number: 04-20110492**  
**Sales/Use Tax**  
**For Tax Years 2008-2010**

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**ISSUE**

**I. Sales/Use Tax—E-Mails.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-1-26.5; IC § 6-2.5-4-16.4.

Taxpayer protests the imposition of use tax on software.

**STATEMENT OF FACTS**

Taxpayer is a retailer and distributor of various personalized gifts. Taxpayer was audited by the Indiana Department of Revenue ("Department") for sales and use tax for the years 2008 through 2010. As a result of the audit, the Department issued proposed assessments for sales and use tax. Taxpayer filed a protest. A telephone hearing was held, and this Letter of Finding results. More facts will be provided below as needed.

**I. Sales/Use Tax—E-Mails.**

**DISCUSSION**

The Department initially notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Taxpayer in its protest states that it is "disputing" the portion of the proposed assessment that "relates entirely to the services portion of the invoices from our vendor [Company R]." Taxpayer states:

[Company R] provides a licensed software package for emailing our clients and prospects, plus a hosted site and provides mass email services. It is our contention that only the licensed software portion of their invoices is taxable and we have remitted that portion with our payment.

Taxpayer in follow-up correspondence to the Department also states it has a monthly agreement with Company R, where Taxpayer pays Company R "to have access to the [Company E] mailing list data base." Taxpayer describes the facts thusly:

[Taxpayer] log[s] in to the [Company E] database and maintain our own various email data bases for prospects and customers. At various times throughout each month, we send emails to various addresses from the database. These emails include general company announcements, promotions, schedules, new product releases and other communication. [Company R] charges [Taxpayer] approximately 3.5 cents per email generated from our mailing list. It is our intention that the fee associated with sending these emails, is a service provided by [Company R], which is not subject to Indiana sales tax.

Taxpayer, in other words argues that the "per email" charge is not part of the cost paid for licensing this product.

Turning to the law, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

And IC § 6-2.5-3-2 states in relevant part:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also of relevance is IC § 6-2.5-1-26.5:

"Specified digital products" means electronically transferred:

- (1) digital audio works;
- (2) digital audiovisual works; or
- (3) digital books.

And IC § 6-2.5-4-16.4, which states:

- (a) As used in this section, "end user" does not include a person who receives by contract a product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person or persons.

- (b) A person is a retail merchant making a retail transaction when the person:

- (1) electronically transfers specified digital products to an end user; and

(2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser.

(c) The sale of a digital code that may be used to obtain a product transferred electronically shall be taxed in the same manner as the product transferred electronically. As used in this subsection, a digital code means a method that permits a purchaser to obtain at a later date a product transferred electronically.

Based upon the information provided by Taxpayer, the Department finds that there is no transfer of tangible personal property nor specified digital product for the protested issue and the fees charged to send e-mails are not subject to sales/use tax. Taxpayer has met its burden of proof under IC § 6-8.1-5-1(c).

**FINDING**

Taxpayer's protest is sustained.

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